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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,

Petitioners,

—v.—

JUDITH A. PAGNUCCO, DONA BARDELLI
BAINBRIDGE, MOLENA A. PORTER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a Warsaw Convention case, where the jury was properly charged, without objection, on the issues of both wilful misconduct and causation, on which there is no conflict among the circuits, did the district court commit any error in the admission or exclusion of evidence which so prejudiced the defendants as to require a new trial?

2. After a hard-fought trial lasting three months and a verdict for the plaintiffs on wilful misconduct and causation, does a careful, multi-layered, discussion of evidentiary questions by the court below, affirming the district court for several different reasons, with supporting evidence to show that even if there had been error it was harmless, constitute the resolution of disputed fact in deprivation of the right to jury trial?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Pagnucco, Bainbridge, and Porter respectfully pray that the petition for a writ of certiorari filed in these cases on behalf of defendants be denied.[1]

STATEMENT OF THE CASE

Proceedings Below

Wrongful death actions against Pan American World Airways (Pan Am) and Alert Management Systems, Inc. (Alert) were commenced in various federal courts and transferred under 28 U.S.C. §§ 1404 and 1407 to the United States District Court for the Eastern District of New York before Chief Judge Thomas C. Platt, Jr. for a consolidated trial on liability.

There were extensive pretrial proceedings. The district court granted defendants' motion to bar punitive damages under the Warsaw Convention[2] and the court of appeals affirmed. *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir.), *cert denied*, 112 S.Ct. 351 (1991). Over 180 depositions were held in the United States, Germany, Scotland, England, Sweden, and Switzerland. The trial was postponed several times pending the release of key causation evidence from the criminal investigation.

The consolidated liability trial, binding on all passenger cases, commenced on April 27, 1992. Thirteen weeks later, the jury, which had heard testimony from 58 witnesses, rendered separate special verdict findings: that the defendants were guilty of wilful misconduct; and that the wilful misconduct was a proximate cause of the deaths (Tr. 6711; JA 1432). Defendants did not object to the court's charge on wilful misconduct and causation (JA 3726-3735; App.1a-3a).

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[1] Citation to the petition for certiorari will be to "Pet."; citation to the appendices to the petition will be to "Pet. App." Citation to the appendix to this brief will be to "App."

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

Three damages trials were then held resulting in verdicts of $9,225,000, $9,000,000, and $1,735,000 respectively. The jury reached a defense verdict on plaintiffs' claims for pain and suffering. Judgments were entered in the three actions. (JA 454-459).

Defendant Pan Am did not move for judgment as a matter of law under Fed.R.Civ.P. 50, their counsel conceding that plaintiffs had presented sufficient proof of wilful misconduct and causation.[3] Defendant Alert's motion for judgment as a matter of law was denied with a written opinion. (JA 460-472).

Defendants appealed to the court of appeals, which affirmed the judgments with a dissent (Pet. App. 96a). Defendants then petitioned for a rehearing with a suggestion for a rehearing in banc which was denied except to the extent stated in a revised majority opinion (Pet. App. 1a). Defendants again petitioned for rehearing with a suggestion for rehearing in banc, which was also denied. (Pet.App 89a).

Facts

I. THE EXPLOSION AND THE INVESTIGATION

On December 21, 1988, Pan Am Flight 103, a Boeing 747 flying at 31,000 feet from London to New York and Detroit, exploded over Lockerbie, Scotland. The explosion and resulting crash killed all 259 persons on board and 11 on the ground. (JA 615-16).

The destruction of Flight 103 gave rise to the world's largest murder investigation. The painstaking investigatory work performed by the FBI, Scotland Yard, Scottish police forces, the Royal Armament Research and Development

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[3] Pan Am's lead counsel stated:

> I never said they had no proof . . . . I didn't even ask for a judgment with respect to Pan Am because I think they have enough on that issue to go to the jury. I've never said they had no case. (JA 3450).

Establishment ("R.A.R.D.E."), the Air Accidents Investigation Branch ("A.A.I.B.") and German Police agencies determined that the Lockerbie bomb was contained in an unaccompanied suitcase transferred to Pan Am Flight 103 in Frankfurt from an inbound Air Malta flight.[4] This was corroborated by specific proof adduced by plaintiffs.[5]

II. FAA SECURITY REGULATIONS

In April 1986, faced with an extreme terrorist threat to U.S. commercial aviation, the FAA imposed extraordinary security procedures under Section XV of the Air Carrier Standard Security Program (ACSSP) at Frankfurt and London. (JA 4017-19, 4185-87). The ACSSP had the force of law, set a minimum standard (JA 4148-9, 4154),[6] and was incorporated in Pan Am's Security Manual (JA 3818, 3934-4047).

The first extraordinary security requirement was the passenger/bag match of Section XV C.1.(a), which required Pan Am to:

> Conduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures. (JA 4017).[7]

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[4] JA 581, 629, 682, 744, 716-17, 2388-89, 2396, 2400, 2405-06, 2579, 2581-84, 2588, 2591, 2631, 2632, SA 172-77; Tr. 1970-71; Tr. 2897, 2905-06.

[5] See Fn 18, *infra*.

[6] Because of its confidential and sensitive nature, the ACSSP was not included in the published Federal Air Regulations. Nevertheless, the ACSSP had the same status as an FAA regulation. A violation of an ACSSP provision was, therefore, a violation of the FARs and a violation of a regulation, including one in the ACSSP, constituted a violation of the Federal Aviation Act, Section 610(a)(5). (JA 4149).

[7] *Physical match* meant baggage would be placed on the tarmac for passengers to personally identify (JA 1713, 4190). *Administrative match* used a checklist, either by computer or manually, to ensure that all

The regulation imposed two separate and distinct requirements; first, Pan Am was to match *every* checked bag with a passenger who actually boarded. An unaccompanied suitcase could then be carried only if subjected to "physical inspection," which required that the bag be opened and the contents searched by hand.[8] (JA 4033-35; JA 3282, 3273, 1683)[9] (SA 209).

The ACSSP also required the airline to use a Ground Security Coordinator (GSC) who would ensure that all security requirements were met prior to flight departure, and advise

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bags were accompanied by an identified passenger (JA 1713, 4204-05). For interline bags, an administrative match required that the baggage tag numbers be compared with the bag tag numbers on the claim ticket of each interline passenger. (JA 557, 2674-5).

[8] Petitioner's contention (pet.7, Fn 8) that "physical inspection" could be done by x-ray is a misstatement since x-ray meets none of the definitions in ACSSP "Physical Inspection Guidelines", b and k, (JA 4033-35; JA 3283; JA 209-10; JA 4189). The ACSSP expressly required physical inspection of unaccompanied checked bags rather than x-ray inspection because physical inspection was a far more thorough and reliable method of detecting bombs. X-ray was permitted by another section of the ACSSP, VIII, at lower security airports where the terrorist threat was less (JA 3978, 4187) and for selectee's bags where the bag's owner was present for questioning (JA 4201-2, 4264-5).

[9] Petitioners mischaracterize the positive match procedure as "Pan Am's x-ray procedure" (Pet 6, 8); "its x-ray procedure" (Pet. 6); "its x-ray inspection" (Pet. 6); and "its use of x-ray" (Pet. 7,9). They attribute to plaintiffs a question they know is phoney, "whether Pan Am used x-ray screening with knowledge that its use would probably result in injury" (Pet. 9). And they purport to describe (at Pet. 5) *"Plaintiffs' Theory of Intentional Rule Violation"* as involving the "requirement that any unaccompanied bags be hand-searched, i.e. XV. C.1.(a) of the ACSSP."

This falsely states both the XV.C.1(a) requirement, and plaintiffs' case. Positive match required that all bags be matched to passengers, and if no passenger, then removal of the bag, and either noncarriage or physical search before being carried. It was a matching requirement followed by a physical search and certainly not an x-ray requirement. There was nothing wrong with using x-ray so long as it was not a *substitute* for positive match followed by physical search. What Pan Am did with respect to interline bags, which were the prime threat, was to *abandon* the positive

the pilot-in-command of "all pertinent security information", including the presence of unaccompanied bags; that certain passengers termed "selectees" face more stringent security checks (JA 4199-4201); that parked aircraft be under constant guard observation (JA 4018); that the airline train, test, and supervise all capable personnel to perform screening functions; and that security personnel were thoroughly familiar with all screening requirements (JA 4206, 4209).

III. AMENDMENTS AND EXEMPTIONS TO THE ACSSP HAD TO BE IN WRITING.

Federal regulations mandated that any amendments to or exemptions from the ACSSP required a written application by the airline and written approval by the FAA.[10] Any changes made had to promote "safety and the public interest". *Id.* Pan Am's Chairman testified that Pan Am never received written authorization from the FAA to substitute x-ray for passenger-baggage match.[11] (SA 198-203). The FAA had no authority to orally amend or waive an ACSSP regulation. (JA 2039, 4167-68). ACSSP XIV required that the FAA be notified in writing by the airline of any change in procedures or implementation procedures. (JA 4234-36).

IV. WILFUL MISCONDUCT: PAN AM'S TOP MANAGEMENT DIRECTED A POLICY OF DECEPTION AND COST-CUTTING WHICH DESTROYED EFFECTIVE SECURITY.

A. The "Alert" security program and surcharge

In May 1986 Pan Am announced its "Alert" security program enacted in response to a sharp decline in international

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match procedure entirely and simply put all interline bags through x-ray. It was the abandonment of positive match that "would probably result in injury" and not the use of x-ray.

[10] 14 C.F.R. §§ 11.25(b)(5), 11.27(e); 108.25(b)(c); 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6)(c).

[11] Pan Am itself had repeatedly submitted written applications for ACSSP exemptions, including a March 1988 request (denied by the FAA) for "relief" from the Section XV requirements (including the passenger-

travel due to terrorist attacks. (JA 1550-51, JA 1562)). A widely published advertisement signed by Pan Am's Chairman of the Board and CEO announced that "Pan Am will initiate one of the most far-reaching security programs in our industry. A program that will screen passengers, employees, airport facilities, baggage and aircraft with unrelenting thoroughness." (JA 479, 1563). At the same time, Pan Am created a separate subsidiary corporation, Alert, to provide contract security services for its flights. (JA 1550).

As part of the Alert program, Pan Am imposed a security surcharge on international passengers ($5 one way or $10 round trip) to pay for the promised additional security measures. (JA 1581). The surcharge generated $18 million in annual revenues for Pan Am.[12] (JA 1581).

B. The appearance of security which didn't exist

The surcharge money received was commingled with general revenues and not earmarked for security. (JA 2993). Pan Am's Frankfurt and London Security Directors testified there was no more money for security and observed no differences in security before and after the surcharge (JA 1857; 1808).

Alert's first President, Fred Ford, was fired after writing a memo to Pan Am's senior executives complaining that the promised security program was not being put into effect and that "now people are beginning to ask: What do I get for my five dollar security surcharge?" (JA 1580-83). Ford testified that Pan Am knowingly paraded untrained dogs as a "bomb-sniffing" canine unit. (JA 1578).

C. Cutbacks on money for security

Pan Am repeatedly cut back on security to save money. It routinely refused to hire sufficient personnel and systematically failed to train, supervise and warn GSCs and screeners,

bag match) for German domestic flights. (Tr. Ex. 56; JA 730 (JA. 1043-44; 1050-62).

[12] Ninety seven passengers on Flight 103 paid the $5 or $10 surcharge. (Ex. 119; JA 754).

as the ACSSP required. (JA 562-63, 1511, 1852-3, 1874-5, 1878, 1954, 2193-2211, 2213, 2274).

In June 1988, Pan Am's management instructed Alert's Manager for Germany, Ulrich Weber, to sharply cut security expenses in Frankfurt and refused to fund necessary training of screeners. (JA 2192-97, 2207-08). Weber testified that Leuniger, the Pan Am Frankfurt station manager's attitude toward security was that it was "[a] waste of time" and should be "[k]ept to a minimum." (JA 2206).

In October 1988, Huebner, Pan Am's Security Director in Frankfurt, wrote to Pan Am's New York headquarters citing the need for more security personnel. (JA 562-63). After expressing his concern that "financial concerns were jeopardizing the lives and safety of Pan Am passengers" (JA 1902), Huebner was told by Pan Am management that "for financial reasons the security staff has to be kept to a minimum." (JA 563 1954).

D. Abandonment of the fundamental passenger baggage match for interline baggage.

Above all Pan Am violated the primary requirement of the extraordinary security requirement: the passenger/baggage match.

In April 1986, when the ACSSP extraordinary security regulations were first enacted, Pan Am established procedures in Frankfurt and London to match interline bags with the baggage claim check numbers of interline passengers who checked in at the gate. (JA 557, 3304). Unaccompanied bags received from other carriers were identified and not carried. (JA 1925)

Top management, however, viewed the interline bag match as "cumbersome" and "a problem" which caused delays and cost the airline money. (JA 1925, 1927, 3283-4, 3305).

As a result in late 1986 top management decided to discontinue the interline bag match at extraordinary security

stations, starting with Athens and Rome in 1986, followed by London in 1987 and Frankfurt in June 1988. (JA 2642-3, 3302).

Pan Am eliminated the threshold positive match process *entirely* for interline bags, and substituted a system where interline bags were x-rayed. (JA 974-75, 3275, 3302). This violated XV.C.(1)(a) in two ways. First, the positive match was abandoned. Second, x-ray examination did not meet the "physical inspection" requirement for an unaccompanied bag to be flown. Unaccompanied baggage from other airlines was routinely loaded on Pan Am aircraft at Frankfurt and London, in violation of XV C.1.(a). (JA 1681-83, 4192-93).

E. Denial of vital information to its pilots and deceiving the FAA

Pan Am's pilots were not informed of the abandonment of the match procedure (JA 2021-2, SA 187-88). London gate employees were told not to advise pilots of unaccompanied bags because it "made the crews jittery" and caused flight delays. (SA 166-67). Similarly, Frankfurt Alert personnel were told not to communicate security problems to flight crews because it resulted in delays. (JA 2201-03). Nor were pilots advised that an x-ray procedure had been substituted for positive match. Furthermore, although ACSSP XIV required Pan Am to advise the FAA in writing of changes Pan Am never advised the FAA that the interline bag match had been discontinued. (JA 4234).

Pan Am's station manager at Frankfurt, Leuninger, instructed Alert's Ulrich Weber to add security personnel during FAA inspections to create the appearance of security which did not otherwise exist. (JA 2214-2219). At an inspection shortly before Lockerbie, Alert sent a guard from the front end of the airplane to the back so that FAA inspectors would think that the airplane was properly staffed in both places. (JA 2219-20). The district court, in denying Alert's Rule 50 motion, observed "that Alert knowingly cooperated with Pan Am employees to disguise chronic understaffing and

noncompliance with FAA regulations at Frankfurt whenever FAA inspections were expected so that they would not have to provide more security." (JA 469).

As a further deception, after the explosion, Weber ordered that the Helsinki warning be backdated to give government investigators the impression that the warning was timely disseminated when received. (JA 2106-11).[13]

V. PAN AM'S KNOWLEDGE OF THE PROBABLE CONSEQUENCES OF FAILURE TO PROVIDE EFFECTIVE SECURITY

For at least six years prior to the bombing, Pan Am was repeatedly warned of bombs hidden in radios or other electronic devices; the grave risk of both unaccompanied and interline bags; and the danger of reliance on x-ray as a screening device. (JA 497-98, 510, 521, 1633-9, 4048-4049, 4096-97).

A. The KPI Report

In September 1986, Pan Am's management received the KPI Report from Israeli security experts commissioned to review Pan Am security at various airports including Frankfurt and London. (JA 482, 3311-13). KPI concluded that "[u]nder the present security system, Pan Am is highly vulnerable to most forms of terrorist attack. The fact that no major disaster has occurred to date is merely providential." (JA 483).

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[13] Petitioners ask why the majority opinion, below, fails to mention Weber's denial that he backdated the warning. (Pet. 25). The answer may be that the original of the *undated* copy, which should have been date-stamped when received, was put into evidence by the plaintiffs along with backdated copies and testimony of four Alert employees who witnessed the backdating (Koch, Christ, Schneider, Hoerr). The trial court found that the back-dating of the warning "was evidence of consciousness of guilt on the part of Alert for its part in the wrongful causation of the crash." (JA 470).

The Report specifically cautioned Pan Am of the risk of unaccompanied bags, criticized Pan Am for its over-reliance on x-ray and warned the airline that x-ray was "not recommended" and "disqualified in principle" as a tool to screen baggage for explosive devices. (JA 492, 497-98, 510, 514, 521, 3313). KPI advised Pan Am that a positive passenger/bag match of all bags, including interline bags, must be conducted to avoid a bomb attack. (JA 535-536, 3313).

B. Abandonment of positive match would permit unaccompanied bags

Pan Am management knew their decision to abandon positive match and substitute an x-ray procedure would permit unaccompanied interline bags, which they knew presented the greatest danger of a bomb explosion, on their flights. (JA 1865, 1870, 3057-58, 3060, 3314-15, 3924).

C. Prior fatal bombings

In 1983 a Pan Am 747 leaving Rome for New York was the target of a bomb inside an unaccompanied interline suitcase. (JA 4194). In 1985 a bomb in an unaccompanied interline bag exploded on an Air India flight over the North Atlantic, killing the 329 persons aboard (JA 4194). The bomb suitcase had been x-rayed. The official Indian Investigation report recommended that interline baggage be matched before loading and cautioned that x-ray "has its own limitations and is not fool proof. Some explosives hidden in radios, cameras, etc. may not be readily detected by such a machine." (JA 1642-1644).

D. Specific FAA warnings of impending bombings

In July 1988, following the shootdown of an Iranian Airlines Airbus by the U.S.S. Vincennes, the FAA warned Pan Am of an imminent terrorist attack against a U.S. air carrier. (JA 1614-15; 1656-60). The entire aviation community was on alert. (JA 1656-67).

In a series of extraordinary warnings in late 1988, Pan Am's management was warned of the place, time and manner of an impending terrorist bomb attack. (JA 564-68, 572-73, 1661-63, 1666-68).

On November 17, 1988, *only five weeks before Lockerbie*, Pan Am received FAA Security Bulletin 88-19 (JA 564) warning that in a raid on a mid-east terrorist group not far from Frankfurt police discovered a bomb built into a Toshiba radio cassette player, obviously intended for use on aircraft. (JA 564-66; 1661-63). The Bulletin cautioned that the Toshiba device *"was very difficult to detect by the use of normal x-ray"* and stated that the requirements of ACSSP XV C.1. must be *"rigorously applied"*. (emphasis added). (JA 564-66).

Still Pan Am did not match interline bags! Moreover, virtually all of the security staff was not informed of the warnings or advised to look out for radio cassette players. (JA 2106-08, 2134-35, 2150, 2176-2177, 2283-2286, 2347-48, 3906-08).

On December 7, 1988, *two weeks before Lockerbie*, Pan Am was issued Security Bulletin 88-22, which advised of a telephone warning in Helsinki that a Pan Am flight from Frankfurt to the United States would be bombed. (JA 572-73, 2106-2110). This Bulletin repeated the warning from Security Bulletin 88-19 about the Toshiba bomb, and the fact that it would be very difficult to detect by x-ray.

Again, key security personnel in Frankfurt were not told of the warning, including Alert's Chief of Training, Oliver Koch, who was responsible for distributing such warnings to screeners. (JA 2107-08).[14] Koch discovered the warning, which had

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[14] Petitioners ask why the majority opinion does not discuss the testimony of Wolfgang Schwab, who was one of the few screeners who had heard of the Helsinki warning. (Pet.23-24). Virtually none of the Frankfurt or London personnel received either the Helsinki or Toshiba warning including Maier, the x-ray operator, Fuchs and the other screeners at the main counter in Frankfurt, the x-ray screeners in London, and *all* other Alert screeners in London. (JA 2106-08, 2134, 2150-51, 2177,

not been date-stamped on receipt, as required, on the bottom of a pile of papers on the desk of his boss, Weber, early in the morning following the disaster. (JA 2107-09).

VI. FLIGHT 103 REFLECTED THE GENERALIZED INADEQUATE SECURITY CREATED BY MANAGEMENT.

Defendants' security for Flight 103 reflected Pan Am's general security conditions and was riddled with ACSSP violations.

Monica Diegmueller, the GSC for Flight 103 in Frankfurt, was an "alternate" who had only two to three hours of training and did not know what the ACSSP required. (JA 1979-86). She incorrectly believed that another GSC was on the ramp monitoring the aircraft and its baggage, when in fact no one was performing those required functions. (JA 2015-16).

There was no guard for Flight 103 at the Frankfurt ramp as required by the ACSSP. (JA 2156-59, 2164-65). The Alert screener assigned to do so had became ill and left his post. (Tr. 1485-86).

Screener Sabina Fuchs admitted that she had no training and had no idea what a "selectee" was, despite the fact that her principal job was to identify selectees for additional scrutiny. (JA 2351-53).

No passenger/bag match for interline bags was in place.

Pan Am's only defense against a bomb in an unaccompanied interline bag was the Alert x-ray operator Kurt Maier, who worked alone in a trailer parked on the Frankfurt ramp. (JA 3306; Tr.5684). On December 21, 1988 Maier had been employed by Alert for only seven weeks, and had been an x-ray operator for only one month. (JA 3375-79). He had no

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2286, 2347-48). Indeed, Maier, the x-ray screener at Frankfurt testified that he would have acted differently if he knew about the warning. (SA 9) The only screeners who were told anything were a few on duty at the main counter in Frankfurt on December 9 when Schwab heard about a warning regarding female Finnish passengers.

formal training, had never been shown standard training videos and had not been tested on the use of x-ray. (JA 3376-79, 3397, 3399). Alert Training Supervisor Anthony Cooke admitted that allowing a person with Maier's limited background to work alone was an unreasonable risk. (JA 3162-63).

The Toshiba warning was never given to Maier, nor was he ever given instructions to stop bags which contained a radio or radio cassette player. (JA 3405-08; Tr 6110, 6118-20).[15]

Instead, he was only told to look for "suspicious" electronic devices. (JA 3394-96; SA 10-11).[16] Defendants' x-ray expert, Dr. Grodzins, admitted, however, that x-ray could not possibly indicate if an electronic device contained a bomb. (JA 3335-36, 4576; SA 237-239, 242-245). Contrary to defendants' assertion that there were no radios in the bags he inspected (Pet.4. Fn 6), Maier admitted that *he did not remember* whether any of the bags he x-rayed for Flight 103A contained a radio cassette player.[17]

Maier x-rayed thirteen bags for Flight 103 (JA 3392). One of those bags was the interline Air Malta Flight 180 bag transferred to Flight 103 through the Frankfurt Airport computerized baggage system. This bag was unaccompanied, as no passenger from Air Malta Flight 180 was aboard Flight 103.

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[15] Numerous other Alert screeners testified that no instructions were ever given to remove all electronic devices. (JA 2134, 2150, 2170-71, 2177, 2286; SA 8B, 8C).

[16] Petitioners' statement that Pan Am "required that *every* radio revealed by x-ray inspection. . .be removed and operated" (Pet. 24) is thus false and was rebutted by Maier himself, who was doing the x-raying.

[17] Petitioner's statement (Pet.4, Fn6 and Pet. 24)) that Maier "testified that there was no radio in the bags that he inspected" is based on testimony that Maier recanted! (JA 3413-21, SA 12-20). Furthermore, plaintiffs never contended that Maier, with or without eyeglasses, couldn't recognize a radio cassette player on his x-ray screen. What plaintiffs did claim is that no one, including Maier, could detect the wires and explosive material that would indicate it was a bomb.

Diegmuller, the GSC, told Captain Michael Anthony, the pilot of Flight 103 from Frankfurt to London, that there were no security problems for the flight. (JA 1987-88, 2020-21).

In London, the bags from Flight 103A were loaded into an aluminum container, AVE 4041, and placed aboard the 747 aircraft. (JA 2510-11, 2521-22, 2525-26; Tr. 2485-91). The GSC in London was absent, so Passenger Service Agent Price "acted" as GSC. He was not a qualified GSC, had no security training and was completely unaware of the ACSSP requirements. (JA 2535-37, 2540, 2545).

As the plane was ready to leave the gate, Price learned that passenger Basuta had checked two bags but had not boarded. (JA 2545-46). Price was required under ACSSP XIII E to inform the pilot-in-command, Captain MacQuarrie, of the unaccompanied bags, but did not do so. (JA 2546-48). MacQuarrie departed unaware that unaccompanied bags, including the Basuta bags and the Air Malta bag, had been loaded on his aircraft.

VII. THE LOCKERBIE BOMB WAS IN AN UNACCOMPANIED INTERLINE BAG LOADED ON FLIGHT 103 IN FRANKFURT BECAUSE OF PAN AM'S FAILURE TO PERFORM A POSITIVE MATCH.

The Scottish-American criminal investigation commenced immediately. (JA 1517, 1532). Wreckage was meticulously recovered, catalogued and stored. (JA 1522-27). Large portions of the plane were reconstructed. (JA 617-19, 639). Hundreds of police officers participated in the effort and about twenty officers with experience in property identification undertook the process of tracing the recovered baggage to Flight 103's passengers. (JA 1524-25).

The forensic investigators determined that the explosion was caused by a bomb in a Toshiba radio cassette player packed in a Samsonite suitcase on the second layer of suitcases in container AVE 4041, in position 14L of the 747s'

cargo hold. (JA 629, 682, 2405-06). The location of the blast itself indicated the suitcase was a Frankfurt interline bag.[18]

The police identified thirteen different items inside the suitcase when the bomb exploded, including baby clothing, a women's blouse and men's trousers and an umbrella. (JA 2438-39, 2461-62). They were traced to Malta by Detective Chief Inspector Harry Bell who identified their places of manufacture and then, through job lots, the retail shop in Malta named "Mary's House" where they had been sold. (JA 2444, 2448, 2452-55).

Plaintiffs corroborated the Air Malta connection established by the criminal investigation with the Frankfurt Airport computer printout, which showed the movement of all suitcases to Pan Am Flight 103, the time each was "coded in" and the "station" where it was coded in. (JA 2376-78). The printout showed that at 1:07 p.m., a bag for Pan Am 103 was coded in at Station 206 and delivered to Pan Am at Gate B44 at 3:23 p.m. (JA 581, 2383-84).

The printout's accuracy was confirmed by the computer control room supervisor (JA 2357-60, 2365-70), and by the baggage traffic controller. (JA 2354-56, 2376). The Station 206 worksheet showed that at 1:07 p.m., only bags from Air

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[18] Petitioners, as well as the dissenting judge below say that no one except the terrorists knows how the bomb got on the flight.(Pet. 3) That is wrong. Plaintiffs traced the course of the bag from the Air Malta airplane on the tarmac at Frankfurt airport, to FAG baggage conveyance system coding station 206, through the conveyance system to holding station HS33, to Gate B 44 where Pan Am flight 103 A, the 727 which would fly to London, was loading, onto a small wagon which Tuczu took to Maier's x-ray machine, through the x-ray machine and back on the wagon, to the 727 where it was one of the 13 last bags loaded, to London Heathrow Gate K16, where it was one of the first bags down the rocket, onto the second level of bags in Container AVE 4041, and to the 747 at Gate K14 where container AVE 4041 was loaded in the 14L position. (JA 2513-2522, 2462-65, 2506-07). Plaintiffs proved the center of the explosion was on the second level of bags in that container in a brown Samsonite suitcase with clothing and other materials around it that had been manufactured and bought in Malta at a retail store by someone who didn't care what size clothing he was buying. (JA 2444-55).

Malta Flight 180 were coded in. (JA 744, 2388-89; Tr. 1970-71). There was no passenger for Flight 103 from Air Malta Flight 180. (JA 716-17).[19]

All U.S. and U.K. police and investigating agencies after meticulous investigation and analysis concluded that the bomb bag was unaccompanied. (JA 2396, 2400, 2405-06; Tr. 2897, 2905-06; JA 2579, 2581, 2584; 176-77; JA 2582-83; SA 172-74; JA 2632; SA 175; JA 2588, 2573).

VIII. DEFENDANTS' CASE

A. Defendants were given broad freedom to prove a case

Defendants raised a panoply of defenses in the six weeks afforded them to put in their case. They called Maltese witnesses to show that security procedures were so tight that the bomb could not have originated there. They put FAA "test objects" into evidence (JA 4388-90); discussed the technology of color x-rays, thermal neutron analysis machines and backscatter bomb detection machines (Tr. 5493-5500; JA 1126-28); played a lengthy training video to the jury (Tr. 4235-40); and presented evidence of "bomb" cookies. (Tr. 4885-90). They introduced FAA inspection reports, (JA 4076-4086), explored minor FAG record keeping anomalies (Tr. 4164, 4439-56, 4602-09, 4610-25, 4686-702); explored the possibility that the time registered on the FAG computers could vary by several milliseconds (Tr. 5310-13, 5321-38); suggested that time entries recorded on the worksheets might not be synchronized with the time on the FAG computers (Tr. 4449), showed the vast number of access points and gates at both the London and Frankfurt airports. (JA 1168, 3659; Tr. 3799, 4844-57, 6504),[20] and raised their

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[19] Defendants' own Maltese witnesses helped establish the Maltese origin of the bomb suitcase. (Tr. 5882, 5889-90, 5923). Air Malta's own records showed a discrepancy in the number of bags loaded aboard KM 180. (Tr. 5894-97, 6013-15, 6028-35).

[20] In another misstatement petitioners say "Pan Am was prepared to show - but not allowed to show - that . . . there were almost 40,000

Hubbard bag a/k/a "13th bag" defense, i.e. that of the 13 checked bags x-rayed by Kurt Maier, one belonged to a Pan Am pilot and that it, rather than the Air Malta bomb bag, was the thirteenth bag x-rayed. (Pet. 4-5, Fn6) (Tr. 4741-4808, 5420-56; JA 1130, 1132-33).

B. Defendants' experts

Defendants did not call any aviation security experts. The reports and depositions of the experts they produced showed that they would not offer opinions regarding defendants' conduct or how the bomb got on the flight. (JA 320, 329-32, 447).[21]

Instead, defendants sought to introduce what they called "background" on terrorist groups and testimony on how terrorists are "formidable", how terrorism is like "other forms of warfare", how it is "virtually unstoppable", and how governments did not aid and protect airlines sufficiently and they offered Scotland Yard bomb squad members to provide anecdotal histories of various unrelated bombings. (JA 433, 447, 4416-4434).

C. Sonesen's "oral waiver"

The record below contradicts defendants' unsubstantiated claims that the FAA authorized the use of x-ray as a substitute for the Section XV match procedure.

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airport workers at Frankfurt with access to restricted areas, and they could come and go without having their bags searched (JA 4448-62)." (Pet. 20, Fn 29). But this *was* introduced into evidence by defendants and *discussed specifically* in their closing argument to the jury. (Tr 6501-6502).

[21] Petitioners' effort to compare the exclusion of some of their expert testimony with the admission of evidence of diverse misconduct in defendants' security operation (Pet. 19-20, Fn 29) is entirely misplaced. Plaintiffs proved gross failures to show these were not isolated instances of neglect, but, rather, a pattern resulting from central management contempt for security, and cost cutting. Defendants' purported expert testimony, on the other hand, was not based on any evidence in the case, and it was from experts who had not examined the record and who professed *not* to have any opinion on how the bomb got on the airplane.

The district court found that no proof of FAA verbal authorization was presented. (JA 3075, 3288). Moreover, the court held that such proof, even if it existed, was inadmissible because Pan Am was charged with knowledge of the ACSSP[22], knew that any amendment or exemption could only be made in writing, and also knew that FAA personnel had no authority to make verbal changes. (JA 3046). The court of appeals affirmed the district court's ruling.

Defendants had offered, or suggested, three witnesses on the point: Sonesen, Cozzi and Plaskett. As to the testimony of Cozzi, the court of appeals, as well as the district court, held it was inadmissible hearsay. (Pet. App. 14a; JA 3265, 3267). Plaskett, the Chairman and CEO of the company, admitted he did not remember any conversations concerning FAA authorization. (Pet. App. 15a).

Sonesen, Pan Am's critical witness on the point, was not called to testify at trial, nor did defendants offer portions of his four day deposition testimony. In their sworn interrogatory answers, defendants claimed that FAA authorization occurred at an October 1987 meeting of the Air Transport Association (ATA) Security Committee in Miami Beach, Florida attended by FAA Security Director Salazar who "approved x-ray as an alternative for the physical search of unaccompanied baggage." (JA 833). Sonesen testified on at least three separate occasions under oath in 1990 and 1991 that his "understanding" of FAA "dispensation . . . from the provisions of Section 15 . . . dates from that ATA meeting in October of 1987 in Miami." (JA 868-69, 1025-26, 1028, 1043-44, 1046, 1093).[23]

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[22] Several times petitioners attempt to equate and confuse the state of mind of the defendant air carrier, Pan Am with the alleged state of mind of Mr. Sonesen. See Pet. 14, 15, and 19.

[23] Pan Am also withdrew its Security Director, Cunningham as a trial witness. Cunningham had previously claimed it was his "understanding" that Salazar discussed use of x-ray in lieu of the match at a March 1988 meeting of the ATA security group in Arizona. (JA 975, 977, 994). After learning that Salazar did not attend the March meeting, Cunningham claimed that FAA Security Officer Blazer, who did attend, was the source of his information. (JA 990). Lally, who chaired that meeting,

This testimony was undermined when document discovery revealed that the Pan Am had acted by December 1986—nine months *before* the Miami meeting—to use x-ray and abandon the match at extraordinary security airports. (JA 1101-02, 3302).

Moreover, Pan Am's defense was at odds with the fact, eventually admitted by Sonesen himself, that the 1987 Miami meeting dealt *only* with procedures for lower security airports, mainly located inside the U.S., and that the Section XV C.1.(a) standards for "extraordinary security" airports were *never* discussed. (JA 1026-28).[25]

The ATA Security Chief who chaired the Miami meeting, acknowledged that Salazar did not discuss extraordinary security procedures. This was further confirmed by the minutes of the meeting and other airline representatives in attendance. None of the participants could recall any discussions regarding the Section XV C.1.(a) passenger/bag match or the use of x-ray at extraordinary security airports. (JA 836-39, 852, 899-900, 904-05, 917, 922).

In 1991, Sonesen contradicted his prior testimony, and for the first time alluded to the possibility of FAA authorization dating back to 1986. (JA 1018, 1035). On July 6, 1992, one half hour before plaintiffs' closing argument at the trial, defendants served a supplemental interrogatory response stating that Sonesen initially received oral approval for Pan Am

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testified that there were no discussions regarding extraordinary security airports. (JA 898-901, 904-06, 917). This was confirmed by the minutes and others present, including other airline representatives and Blazer himself. (JA 841-48, 852, 930-32, 936-39).

[25] Sonensen said that at the meeting "we were discussing [ICAO] 514 . . . not 15", and that Salazar "gave me the impression" that he was granting "relief", "waiver", "dispensation", an "exemption", from ICAO Standard 5.1.4. (JA 870, 876-79, 1014-17, 1025-30, 1043-46, 1095). The ICAO Standard 5.1.4 requirements are set forth in ACSSP Section VIII and establish the procedures for lower security airports which, as Sonesen acknowledged, were supplanted by Section XV C.1.(a) for extraordinary security airports. (JA 1017, 1031). Salazar testified that only ICAO 5.1.4. was discussed at the meeting. (JA 2081-82).

from FAA personnel in 1986, rather than at the 1987 Miami meeting.[26] (SA 98-101).

This second version of Pan Am's defense, however, was fatally flawed: Sonesen was unable to give the content of the alleged hearsay conversation(s) and could not provide the name(s) of the FAA personnel involved, their job title(s) or authority, their responsibilities regarding the ACSSP, or the date(s) (except for the year 1986) or the venue(s) of the discussion(s).[27] (JA 1018, 1035).

With respect to Sonesen the court of appeals found, first, that defendants' argument that the alleged waiver was an "interpretation", rather than an amendment, exemption, or waiver, was untenable, since XV.C.1(a) was unambiguous. (Pet. App. 8a-10a).[28] Next it found that the record did not reveal any express offer of proof by defendants of what Sonesen's testimony would have been, and its "faith in the defen-

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[26] During the discussions before the district court, defendants relied on the 1987 Miami meeting as the basis for their defense and did not mention any 1986 conversations. Counsel never articulated the substance of Sonesen's proffered trial testimony or provided a cohesive narrative of the alleged FAA authorization. (JA 1956-57, 2855-58, 2940-41, 2953-58, 3004-09, 3041-49, 3073-75, 3627; SA 192-96, 203, 216-21, 224-27).

[27] When Sonesen stated that he could recall no conversation with Salazar prior to the Miami meeting, he was asked "Can you recall any conversation you had with anyone else from the FAA, prior to October of 1987, regarding the passenger/baggage match requirement of Section 15?" He answered: "Specifically, no." (JA 1018).

While defendants rely on the testimony of Pan Am Task Force Co-Chairman Cozzi in addition to Sonesen, Cozzi conceded that he was "relying completely on Mr. Sonesen" for his claim that oral approval was obtained from the FAA. (JA 3275).

[28] Pan Am's own management and security officers conceded that XV.C.1(a) was unambiguous and required a match and noncarriage or physical inspection (by "open[ing] up the suitcase") of unaccompanied bags. (JA 1029-30, 3289-90, SA 1-2, 209-10, 212-13). Likewise, Pan Am alleged, in their answers to interrogatories and elsewhere, that the FAA "approved" x-ray as an "alternative" to Section XV's requirements, an acknowledgment that the provision itself did not permit x-ray.

dants' versions of Sonesen's testimony is not enhanced by the fact that Sonesen's 1990 deposition testimony is substantially inconsistent with the representations made by the defendants before us." (Pet. App. 13a).

The court said the failure to properly offer the proof would, itself, waive the potential error, but even "assuming without deciding that defendants sufficiently preserved their objection" does not change the result (Pet.App. 16a-17a).

First, the court of appeals said viewing the exclusion as being based on the "government authorization" theory, that required the existence of a government official who had authority to grant the waiver, and "the FAA officials allegedly contacted simply did not have the actual authority to grant any verbal authorization for Pan Am's x-ray only inspection of interline bags. (Pet.App. 17a).

Second, viewed as "mistake of law", that defense was not allowed, except in limited tax cases, and a heavily regulated air carrier may not claim ignorance of the law as an excuse. (Pet.App. 18a-20a).

Third, viewed as evidence of state of mind of the carrier, the court of appeals, citing *Vinieris v. Byzantine Maritime Corp.*,731 F.2d 1061 and Fed.R. Evid.403 held that "because the oral waiver evidence was so intertwined with the government authorization and mistake of law defenses . . . . admission. . .might well have been unnecessarily confusing and perhaps prejudicial so as to justify the trial court's refusal to allow its admission." (Pet. App. 20a-21a).

Fourth and finally, the court held that "even if it were an abuse of discretion to deny admission of the oral waiver evidence on the foregoing grounds, we hold that such an error was harmless;" ie. "it had no substantial effect on the jury's verdict, because the record was replete with overwhelming evidence that Pan officials ignored repeated warnings and signals that its security measures were insufficient." (Pet. App. 21a).

The court cited proof of Pan Am's knowledge of a frightening buildup of bombings, receipt by Pan Am of the 1986 KPI Report showing that Pan Am was highly vulnerable to most forms of terrorist attacks, and receipt in both November and December, 1988, just before the Lockerbie disaster, of Security Bulletins 88-19 and 88-22, specifically warning of the discovery of a Toshiba bomb and warning that the bomb was difficult to detect by normal x-ray, and the Helsinki warning that a Pan flight from Frankfurt to the United States would be bombed within two weeks. (Pet. App 21a-23a).

Defendants also made the argument that the Sonesen purported testimony of oral waiver was admissible to rebut the testimony of Raymond Salazar, the FAA Director of Security, that Sonesen's statement in a Pan Am E-mail message that Salazar had granted x-ray as an alternative, was false. The court of appeals found that whether to allow otherwise inadmissible evidence in to rebut a false impression left by other inadmissible evidence introduced by the opposing party is left squarely to the trial court's discretion, and the trial court had offered the defendants a curative instruction directing the jury to disregard the Salazar testimony, which offer the defendants refused.[29] (Pet. App. 16a.)

D. The proffer of U. K. regulations.

Defendants attempted to introduce evidence of British "regulations", which they claimed did not require positive match. Some of this evidence was admitted.[30]

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[29] Even Sonesen's E-mail did not say that Salazar granted x-ray as an alternative to the threshold positive match. It was said to be an alternative to the physical inspection of the unaccompanied bag *after* the match was completed.

[30] For example, defendants read to the jury the deposition testimony of Norman Shanks that Chris Price's failure to inform Captain MacQuarrie of the unaccompanied Basuta bags aboard the aircraft and his dispatching of the aircraft with those unaccompanied bags on board did not violate British security practices. (Tr. 3839-43).

Documents offered by defendants included a version of the Toshiba warning first received by Pan Am four weeks *after* the disaster and various items concerning aspects of Heathrow Airport security. Apart from their irrelevance, all but one of the documents were informational "circulars" which, unlike "directions", do *not* have the force of law. Moreover, many of the circulars were issued in 1985 before ACSSP XV C.1(a) came into effect, and had lapsed in 1987. (Tr. 3781, 3784-5, 4978-9).[31] The circulars were properly excluded because of their non-binding nature, vagueness and their being too remote. (Tr. 4304-4305, 4314).[32]

Contrary to Petitioners' representation the one "direction" excluded from evidence did *not* permit x-raying in lieu of checked baggage/passenger matching. Rather, it required "reconciliation" of all bags to passengers—the same requirement contained in XV C(1)(a).[33] What petitioners' really sought to offer was one opinion in several pages from the deposition of James Jack, Principal Aviation Security Adviser for the British Department of Transport, that British regulations would have permitted Pan Am to x-ray unaccompanied interline bags that had been identified by the baggage/passenger reconciliation process. The trial court found that, inasmuch as Pan Am was bound to follow the higher standards of

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[31] Only one U.K. regulation or "direction", Ex. (Iden.) EL, was excluded from evidence. It was excluded because defendants' counsel sought to unfairly manipulate its language. The court offered to admit EL and plaintiffs consented to its admission provided defendants' counsel gave the plain meaning to the word "operator", which defendants refused to do. (Tr. 4316-23). In any event it required a passenger baggage "reconciliation" or match. Pan Am violated it, as well as XV.C.(1))(a).

[32] The two arguably relevant circulars defendants sought to introduce were excluded for those reasons, Exhibits EJ and EK (Iden.), both of which required that baggage be checked against passengers and removed if no passenger unless the aircraft captain was satisfied there was no danger.

[33] The statement at Pet. 24 that the British Government authorized the use of x-ray to screen unaccompanied baggage is misleading. "Reconciliation," which means the same as positive match, was required *first*. See Jack deposition, designated by defendants, p. 30.

the ACSSP, this testimony was irrelevant unless Pan Am admitted it *knew* it was violating ACSSP, but was relying on the British standards on the issue of its state of mind. Since the defendants refused to admit that, the trial court refused to admit Jack's opinion.

The court of appeals found this was error, but harmless since there was other evidence that Pan Am's conduct comported with British regulations, that plaintiffs' case rested principally on violation of ACSSP regulations, and since Pan Am and Alert presented a strong defense concerning the effectiveness of the use of x-ray, anyway. On the entirety of the 7,000 page record the court did not believe the few pages, including the one sentence Jack opinion, regarding British requirements that Pan Am also violated, would have persuaded the jury. (Pet. App. 25a).

IX. THE TRIAL COURT'S CHARGE TO THE JURY ON WILFUL MISCONDUCT AND CAUSATION.

The trial court's charge to the jury was largely taken from defendants' requests to charge, and it followed the traditional principles advanced in the cases approved by the petitioner (Pet.11-13).[34]

First the court identified the two separate issues. (App. 1a). Then it explained wilful misconduct. (App. 1a). Next it made specific reference to violation of FAA regulations, and pointed out that it might or might not be wilful misconduct. (App. 1a-2a).[35] Then the trial court charged the jury on the issue of causation. (App. 2a).

The defendants did not object or except to this charge.

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[34] Relevant excerpts of the trial court's charge to the jury are set forth in the appendix. (App. 1a-2a).

[35] Petitioners' statement (Pet. 13) that the decision below repudiates the established standard for wilful misconduct and replaces it with a new and simple standard: "did the carrier violate a safety rule?" is belied by the court's charge.

REASONS FOR DENYING THE WRIT

Defendants' petition lists three questions for review, but those questions boil down to one issue: did the district court commit any error in the admission or exclusion of evidence which so prejudiced the defendants as to require a new trial?

Petitioners misstate the facts and history of the case to make it appear that there are important legal questions involving the interpretation of the Warsaw Convention regarding the definition of wilful misconduct and the requirement that the wilful misconduct caused the damage.

There are no such issues herein. The courts below applied the standard definition of wilful misconduct in Warsaw cases. Petitioners overlook extraordinary evidence of Pan Am's actual knowledge of the danger, including the FAA security bulletins issued in the two months before the disaster, warning of the specific danger of a Toshiba type bomb and of a bombing on a Pan Am flight from Frankfurt to the United States, and highlighting the fundamental requirement of the passenger/baggage match, a requirement which Pan Am illegally abandoned two years before the disaster and continued to ignore in the face of a dire threat.

In addition, the courts below required plaintiffs to prove that the airline's wilful misconduct was a substantial factor in causing the disaster. Petitioners overlook the detailed proof which showed that the bomb was contained in a Toshiba radio cassette player packed in an unaccompanied interline bag transferred from an Air Malta flight and accepted and loaded by Pan Am on flight 103, as well as the overwhelming evidence, cited by the court of appeals below, of knowledge of the danger and knowledge of the probable consequences, by petitioners, and the abysmal failures in *every* aspect of petitioners' security.

Finally, there was no "resolution of disputed facts" by the court of appeals, below.

I. THERE IS NO CONFLICT BETWEEN CIRCUITS AND THE TRIAL COURT'S DISCRETIONARY RULINGS ON EVIDENCE WERE CORRECT.

A. There is no conflict between the court below and any other circuit regarding the definition of wilful misconduct and causation under the Warsaw treaty.

Wilful misconduct. The district court's jury charge contained the uniform definition of wilful misconduct which has been routinely applied by courts for over forty years. (App. 1a-2a). Pan Am did not object to the charge. In affirming the judgment, the Second Circuit again defined wilful misconduct in accordance with that uniform rule. The standard cited by Pan Am in its petition, based on cases from four Circuits and four state courts (Pet. 11) is identical to the test applied by both courts below.

The jury was expressly charged that a regulatory violation was not in itself tantamount to wilful misconduct. (App.1a-2a). The court of appeals below held that "A carrier might not have acted with wilful misconduct, even were it to have failed to comply with an FAA regulation." (Pet. App. 13a). Pan Am's claim that the courts below held that wilful misconduct could be shown simply by the violation of a safety rule is groundless.

Causation. Pan Am also did not object to the district court's charge on causation, which was proper and in accord with the treaty. (App. 2a). The jury made a separate special verdict finding that Pan Am's wilful misconduct "was a substantial factor in causing the disaster". As the court of appeals below held, "the district court carefully and in an extensive and well balanced charge instructed the jury that it must find not only wilful misconduct, but also a causal connection between that misconduct and the passengers' deaths." (31a).

The court below's holding that causation can be established "by inference based on the totality of the circumstances" applied a hornbook rule not subject to dispute. The District of

Columbia Circuit reached a similar conclusion in *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1481 (D.C. Cir.), *cert. denied*, 112 S.Ct. 616 (1991), which upheld a wilful misconduct verdict based on circumstantial evidence of "a pattern of conduct giving rise to liability."Pan Am's argument that the courts below approved a "res ipsa loquitur" standard for causation is frivolous.

In sum, there is no conflict regarding the treaty's definition of wilful misconduct or causation and no basis for the exercise of this Court's discretionary jurisdiction.

B. The trial court's discretionary rulings on evidence were correct.

Defendant Pan Am did not move at trial for judgment as a matter of law under Fed. R. Civ. P. 50 and defense counsel conceded that plaintiffs had presented sufficient proof to support the liability verdicts.

As a result, the only issue raised on appeal before the Second Circuit was whether the district court abused its discretion over the admission of evidence. There was no such abuse.

1. The Government authorization defense.

Pan Am failed to make a proper offer of proof. Pan Am's so-called government authorization defense relied on fatally vague statements of counsel that were contrary to the factual record and unsupported by a proper offer of proof. Pan Am alleged that its employee Sonesen received oral approval from the FAA but did not specify the name and office of the FAA employee involved, or the date (other than late 1986 or early 1987) and place of the conversation. Neither Sonesen, nor his immediate superior, Security Director Cunningham, was called to testify and Pan Am's claims were contradicted by Sonesen's prior testimony and the airline's own answers to interrogatories.

It is well established that the failure to present the factual predicate for a defense to permit trial court and appellate

review is a proper basis for exclusion. *Jones v. Berry*, 880 F.2d 670 (2d Cir. 1989)(an offer of proof should have be made to permit "the reviewing court to make a reasoned evaluation of the impact of the trial court's decision.").

Pan Am's defense was properly barred as contrary to clear FAA regulations. The courts below correctly ruled that Pan Am was charged with knowledge of the subject regulations mandating a passenger/baggage match and requiring that any change to that procedure necessitated a written application by the airline and written FAA approval. (19a); 14 C.F.R. §§ 11.25(b)(5), 11.27(e); 108.25(b)(c); 49 U.S.C. §§ 1357(a)(2)(B), 1421(a)(6)(c). Pan Am's last minute claim that the regulation was subject to an alternative "interpretation" was unsupported by any witness or proof, and was contradicted by the clear language of the regulations, the testimony of Pan Am's officers and employees and the airline's answers to interrogatories.

To allow Pan Am to challenge the subject FAA requirements under the circumstances herein would mock the carrier's regulatory obligations and improperly present the jury with a question of law. As the Second Circuit ruled, "[t]here is cause to be wary because of the ease with which air carriers could fabricate sham defenses and ignore with impunity safety regulations." (20a). Pan Am has failed to cite a single case in conflict with the Second Circuit's holding or which allows an airline in a Warsaw (or other tort) action to introduce claims of mistake contrary to clear and binding regulations.

2. Defendants' pattern of misconduct in failing to provide mandated security was admissible.

Plaintiffs demonstrated that the entire Pan Am security system was corrupted by the corporate management's contempt for security, reflected by cost cutting and deception, which resulted in security failures in every element of the system, the most important example of which was an abandonment of the baggage match requirement.

Proof of the pervasive misconduct involving Frankfurt and London security was admissible on the issue of defendants' wilful misconduct. The prevalence of wrongs permitted the jury to infer that Pan Am was reckless and knew the probable consequences.

Fed. R. Evid. 404(b) provides that "[e]vidence of other . . . wrongs, or acts" is admissible to prove motive, intent, plan or knowledge.[36] Wilful misconduct may be based on the totality of a defendant's wrongdoing. *Complaint of Tug Ocean Prince v. United States*, 584 F.2d 1151, 1164 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). Similarly, "evidence of motive and of intent may be adduced for the purpose of establishing, by culmination and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." *Goldwater v. Ginzburg*, 414 F.2d 324, 342, 336-37 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

Defendants' pattern of failures and misconduct in all areas of their security functions was also probative on causation. The evidence that the passenger and baggage screeners were untrained, that the aircraft was left unguarded, that critical warnings were not distributed and that substantial cost-cutting had occurred, allowed the jury to infer the causal link between defendants' misconduct and the disaster, even if it rejected the Air Malta proof. As reflected in the trial court's charge, accepted by the petitioners, multiple acts of wilful misconduct may be proven, and it is for the jury to determine if they constituted substantial cause of the deaths.

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[36] Courts have repeatedly held that relevant evidence includes the "overall context", "pattern", "state of mind" and "complete story" of a defendant's course of conduct. *E.g.*, *Ismail v. Cohen*, 899 F.2d 183, 188-89 (2d Cir. 1990); *United States v. Diaz*, 878 F.2d 608, 613-16 (2d Cir.), *cert. denied*, 493 U.S. 993 (1989); *United States v. Brennan*, 798 F.2d 581, 589-90 (2d Cir. 1986); *United States v. Smith*, 727 F.2d 214, 219-21 (2d Cir. 1984). Courts have also approved the introduction of background evidence "to show. . .the circumstances surrounding the events or furnish an explanation of the understanding or intent with which certain acts are performed." *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988).

II. DISCUSSION IN THE MAJORITY OPINION DID NOT CONSTITUTE THE RESOLUTION OF DISPUTED FACTS IN DEROGATION OF THE RIGHT OF TRIAL BY JURY.

The claim by the petitioner that the court of appeals resolved disputed questions of fact in derogation of the right of trial by jury, is nonsense. In its discussion of the exclusion of some evidence the court found that there might well have been no error at all, but even if there was, it was harmless, citing other admitted evidence that would have overshadowed it in any event. This was not the resolution of disputed facts. It was an explanation of why the error, if it existed, was harmless.

CONCLUSION

For the reasons heretofore stated the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from The trial court's charge to the jury on wilful misconduct and causation.

First the court identified the two separate issues:

> "You will decide two questions. First, whether or not the defendants engaged in one or more acts of wilful misconduct. Second, whether any wilful misconduct that you find was a proximate cause of the destruction of Flight 103 and the deaths of its passengers.
>
> If you find that wilful misconduct on the part of either or both defendants was a proximate cause of the passenger's death, each plaintiff will be entitled to recover his or her actual damages." (TR 6555)

On the issue of wilful misconduct itself the trial court further charged the jury:

> "Wilful misconduct is the intentional performance of an act with knowledge that performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply disregard of the probable consequences of the performance of the act.
>
> Likewise, the intentional omission of some act with knowledge that such omission will probably result in damages or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct." (Tr. 6557)

With specific reference to violation of FAA regulations the court added:

> "I instruct you that the violation of FAA regulations and safety standards, and/or defendant's own internal safety

standards and procedures would not necessarily constitute wilful misconduct.

However if you find that any such violation was intentional, with knowledge that the violation would probably result in damage or injury, then that would be willful misconduct. Likewise, it would be willful misconduct if an intentional or knowing violation was done with a wanton and reckless disregard of the consequences.

Plaintiffs claim multiple violations of said regulations and standards by the defendants and their employees and have detailed in their summary arguments the particular conduct and particular regulations and standards which they say constituted these violations, or more or all of which, together with the remainder of their evidence, according to them, prove both misconduct and willfulness which they claim was a proximate cause of the death of the passengers." (Tr. 7557-8).

On the issue of causation the trial court charged the jury:

"If you determine that there was no such willful misconduct, then you must stop right there and you must bring in a verdict for the defendants. If, however, you find that either or both the defendants or any of their employees committed one or more acts of willful misconduct, then you must go on to consider whether or not such willful misconduct as you have found was a proximate or the legal cause of the death of the passengers on the plane.

Now, to be the legal cause of this result, namely, the death of the passengers, the willful misconduct must be a substantial factor in bringing about that result.

Furthermore, there must be an actual and continuous sequence connecting the act of willful misconduct with the death of the passengers.

I say willful misconduct must be a substantial factor in bringing about the deaths." (Tr. 6558-9).

* * *

"An act or omission by a defendant is not a proximate cause of an accident if the accident would have occurred anyway, that is, even absent the defendant's act or omission.

The mere fact that this accident happened, standing alone, does not permit you to draw the inference that this accident was caused through the fault of either defendant. Thus, the mere fact that there was a bomb placed on board the aircraft does not prove that the defendants were guilty of willful misconduct that caused the crash and, in fact. does not prove any element of the plaintiffs' case." (Tr. 6561).